

Supreme Court, U.S.
FILED

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MICHAEL ROZAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

79-806

VICTOR W. DUNGAN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

THOMAS L. HOGAN
JOHN TIM McCALL

3636 1st National Towers
Louisville, Kentucky 40202

*Counsel for Petitioner,
Victor W. Dungan*

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VICTOR W. DUNGAN - - - - - Petitioner

v.

KENTUCKY BAR ASSOCIATION - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, Victor W. Dungan, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in the above entitled case on August 21, 1979, by the Supreme Court of Kentucky.

OPINION BELOW

The opinion of the Supreme Court of Kentucky dated August 21, 1979 is reported at 586 S. W. 2d 15. The opinion and recommendation of the Board of Governors of the Kentucky Bar Association is in the Appendix at pages 17-26.

JURISDICTION

The petitioner, a licensed practicing attorney in Kentucky was charged by the Kentucky Bar Association with two counts of unprofessional conduct follow-

ing an evidentiary hearing before a trial committee of one commissioner and an *in camera* proceeding before the Board of Governors. The Supreme Court of Kentucky made its own fact finding and conclusions and ordered that petitioner be permanently disbarred from the practice of Law in Kentucky.

A timely petition for rehearing was denied by the Supreme Court of Kentucky without opinion.

This petition for a writ of certiorari is being filed within 90 days after that order. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Since the Board of Governors decision can be final, should it not provide a due process hearing and allow for oral argument before it, to urge a result of not guilty or for a private reprimand if found guilty?
2. If the Supreme Court of Kentucky's decision is done on the basis of a *De Novo* consideration of the pleadings and trial record, must it provide a due process evidentiary hearing and oral argument?
3. Has the Bar Association met the burden of proof and should the standard of proof be higher than the "substantial evidence" standard of RAP 3.330?
4. Where the Supreme Court of Kentucky is the Court of original jurisdiction, is it a denial of equal protection and due process to deny the right of appeal to attorneys although every other class of litigants is permitted an appeal as a right?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, §1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Rules RAP:

"Rule 3.170—PROCESSING DISCIPLINARY CASES

"Upon the expiration of fifteen days, or receipt of response, the Director shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge."

"Rule 3.330—ORDER OF PROCEEDINGS AND BURDEN OF PROOF

"The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by substantial

evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Commissioner there shall be no further oral argument or briefing either before the Trial Commissioner or before the Board."

"Rule 3.360—TRIAL COMMISSIONER TO FILE REPORT WITH BOARD

"When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

- (a) the charges made against and the defense offered by the respondent;
- (b) the proceedings had;
- (c) the facts which the Commissioner deems proven by substantial evidence.

The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory. Within forty (40) days after the filing of the report with the Director, each party shall file a brief simultaneously with the Director and no reply briefs shall be permitted."

"Rule 3.370—BOARD'S ACTION ON TRIAL COMMISSIONER'S REPORT AND PROCEDURE IN THE COURT

"(1) Upon receipt of the report of the Trial Commissioner, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice-President and the fourteen duly elected members of the Board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

"(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

"(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or $\frac{3}{4}$ of the members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes, together with decisions of the Board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision together with a copy of the

Trial Commissioner's report, to the parties or their counsel and to each member of the Tribunal.

"(4) The Board will, in its decision, state wherein it differs with the findings of fact of the Trial Commissioner, and will state the discipline, if any.

"(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the Clerk by the Director.

"(6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response *in forma pauperis*, no bond shall be required.

"(7) The Court may within forty (40) days of the filing of the Board's decision notify both the Director and respondent that it will review the Board's decision. If the Court so acts, the Director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the Court whereupon the case shall stand submitted. Thereafter the Court shall

enter such orders or opinion as it deems appropriate on the entire record.

"(8) If the respondent does not file a notice of review or the Court does not notify the parties of its review under paragraph (7) of this Rule, the Court shall enter an order adopting the decision of the Board relating to all matters.

"(9) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (7) of this Rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order."

STATEMENT OF THE CASE

The Petitioner, Dungan, was appointed by the court as a public defender to represent Richard Krueger. Mr. Krueger's mother called on the Petitioner at his office and advised him of the appointment and discussed the case with him. Mrs. Krueger had in her possession two \$1,000.00 cashiers checks. The testimony was that she had been to both banks in Shepherdsville and nobody would cash a check. Dungan called his bank in Louisville regarding the check. She testified that Mr. Dungan took the entire \$1,000.00 and from it he paid \$159.00 in fine, returned \$141.00 to her and retained \$700.00 as an attorney fee. Mr. Dungan testified that he deposited the \$1,000.00 check in his escrow account and refunded \$700.00 to Mrs. Krueger in cash. Mr. Dungan maintained two separate accounts; a business account and an escrow account. The proof showed that if he had been paid a fee he would

have deposited the \$700.00 in his business account. He then paid Mr. Krueger's fine and court costs (\$159.00) out of the remaining \$300.00 and refunded to Mrs. Krueger \$141.00. He wrote a check to himself out of the escrow account for \$700.00 as a refund of the money he had paid Mrs. Krueger out of his pocket. On that check is noted "Refund of Personal Funds".

That notation was on that check before Mr. Dungan could have had any idea that this woman was going to make a complaint against him. After Mrs. Krueger came into his office with the money, Mr. Dungan went to see the Judge who would hear the case.

Mr. Dungan's secretary likewise testified regarding the fact that Mrs. Krueger could not get the check cashed. She heard him counting the money and saw it lying on his desk.

During the hearing on Richard Krueger's case, Petitioner advised the Court that he had \$300.00 of Mrs. Krueger's money. He also moved the Court to remove him as public defender as Mrs. Krueger had at least \$1,000.00 with her and thus did not qualify for a public defender. Mrs. Krueger testified that she had \$2,000.00 with her. The motion for removal as a public defender was overruled.

A complaint was made against Petitioner by Mrs. Krueger even before the hearing on her son's case, although the formal charge was not brought until shortly after the hearing. Mr. Dungan's case was referred to the Grand Jury which heard the same testimony heard by the trial commissioner. The Grand Jury refused to indict Petitioner.

This complaint was then filed before the Kentucky Bar Association. An evidentiary hearing was conducted before one trial commissioner appointed by the Bar Association at which two totally different versions of the events were given. The trial commissioner elected not to believe Petitioner.

The Board of Governors met *in camera* and reviewed the case on the record and ruled on February 22, 1979 that Petitioner be permanently disbarred from the practice of law in Kentucky.

In a *per curiam* opinion the Supreme Court of Kentucky adopted that recommendation.

REASONS FOR GRANTING THE WRIT

In Re Ruffalo, 390 U. S. 544 (1968) establishes that disciplinary proceedings of an attorney are "adversary proceedings of a quasi-criminal nature." Long ago this Court recognized the 14th Amendment principle that a disbarment order arising from such a quasi-criminal proceeding cannot stand if "the State procedure, from want of notice or opportunity to be heard was wanting in due process." *Sellings v. Radford*, 243 U. S. 46, 51 (1917). The petitioner is thus justified invoking the certiorari powers of this Court to reject a state disbarment order which presents important procedure principals under the 14th Amendment. No prior Supreme Court decision has focused on these two questions created by the procedures employed in Kentucky.

I. Since the Board of Governor's Decision Can Be Final, Should It Not Provide a Due Process Hearing and Allow for Oral Argument Before It to Urge a Result of Not Guilty Or for a Private Reprimand If Found Guilty?

The Board of Governor's recommended that Petitioner be permanently disbarred from the practice of law in Kentucky. Had they determined that he was not guilty or that even though guilty he should have been given a private reprimand, their decision would have been final.

Under these circumstances, he would have been denied all due process protection before the Board that could make a final determination. There is no opportunity to submit a written brief or to make an oral argument. The fact that the Board of Governor's determination was such that their action was not final in this particular case does not change the fact that an attorney is entitled to due process. He is entitled to be heard before the Board. See: *Southern Railway Co. v. Virginia*, 290 U. S. 190 (1933).

At this stage of the proceeding, due process protection must be provided in the Kentucky procedure. As early as 1908, this Court in *Londoner v. Denver*, 210 U. S. 373, 386 stated:

"But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

It is the obligation of the Board of Governors, if they retain the authority to finalize, to consider the evi-

dence or argument for "the one who decides must hear." *Morgan v. U. S.*, 298 U. S. 468, 481 (1936). At the very least, due process requires an oral argument. In *F.C.C. v. WJR*, 337 U. S. 265, 276 (1949), this Court stated "the right of oral argument as a matter of procedural due process varies case to case in accordance with differing circumstance." Disciplinary proceedings are "quasi-criminal" *In Re Ruffalo, supra*.

The Petitioner submits that disbarment is so severe a penalty when pertaining to a lawyer's career that due process requires the right to be heard orally before any body with the power to make a final disposition. *Herring v. New York*, 422 N. S. 853 (1975), reaffirms "the adversary system's commitment to argument" in a criminal case and should be applicable to a "quasi-criminal" disbarment action.

II. If the Supreme Court Decision Is Done On the Basis of a *De Novo* Consideration of the Pleadings and Trial Record Must It Provide a Due Process Evidentiary Hearing and Oral Argument?

The Supreme Court of Kentucky in *Kentucky Bar Association v. Stivers*, Ky., 475 S. W. 2d 900, 903-904 (1971), stated:

"In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this Court (RAP 3.360, 3.370). This means of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-

finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding.

"In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway."

and reinforced in *Kentucky Bar Association v. Collis*, Ky., 535 S. W. 2d 95 (1975), cert. denied, 46 L. Ed. 637.

Thus, the Court is acting as a *de novo* fact-finder. If the Court is going to take on "the role of fact-finder" and relegate the fact-finding function of the trial committee and the recommendations of the Board of Governors to "hortatory", then due process protections as discussed relating to the Board of Governors applies to the court.

This Court's decision in *Willner v. Committee on Character*, 373 U. S. 96 (1963), on admission to the bar action, the New York Supreme Court relied on a report of a committee which failed to hold a hearing with due process protections as a basis for rejecting the application.

III. Has the Bar Association Met the Burden of Proof and Should the Standard of Proof Be "Beyond a Reasonable Doubt" Rather Than the "Substantial Evidence" Standard of RAP 3.330?

RAP states *inter alia* that the burden of proof is on the Association and that burden is met by "substantial evidence."

The test in criminal cases is "beyond a reasonable doubt." In a juvenile delinquency proceeding, *In Re Winship*, 397 U. S. 358, 359, n. 1 (1970), this Court struck down a preponderance of evidence standard and requested that the Standard be one of reasonable doubt.

In deportation hearings, although non-criminal, this Court required that the proof be "unequivocal and convincing evidence" where the proceedings have a grave impact upon the lives of human beings. *Woody v. Immigration and Naturalization Service*, 385 U. S. 276, 285 (1966).

The facts in this case demonstrate how the standard of proof was critical. *The grand jury heard the same testimony, yet refused to indict.* And there the standard was less than reasonable doubt. The testimony on both sides was directly contradictory. Yet the Association chose to believe a disgruntled client over a licensed member of the bar.

Who is to say what the vote would have been if the Standard had been higher. The loss of one's life profession is as a severe a loss of freedom as a prison sentence.

IV. Where the Supreme Court of Kentucky Is the Court of Original Jurisdiction, Is It a Denial of Equal Protection and Due Process to Deny the Right of Appeal to Attorneys Although Every Other Litigant in Kentucky Is Permitted an Appeal as of Right?

In Kentucky, the State Legislature has provided that all litigants-criminal and civil (*other than attorneys*) charged in disciplinary proceedings, have at least one appeal as right from the decision of the trier of fact. There is no dispute that the Supreme Court of Kentucky is the trier of fact. In *Kentucky Bar Association v. Stivers, supra*, at page 904, the Court stated:

"In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory which means in simple English that the members of this Court are going to exercise their own judgment anyway."

This view was reaffirmed by *Kentucky Bar Association v. Franklin*, at page 463, where the court said:

"A final decision of guilt can be made only by this Court and it is done on the basis of a *de novo* consideration of the pleadings and the trial record."

The Supreme Court of Kentucky does not sit or review the report and recommendations of the Board of Governors as an appellate tribunal. After the Board has made its determination, the entire record, including the recommendations, is filed with the Supreme Court of Kentucky, RAP 3.370, and a rule is issued for the attorney "to show cause why he should not be

adjudged guilty of unprofessional conduct and disciplined therefor". RAP 3.410.

This Court has held that once a State Legislature provides for an appellate process, it may not deny an appeal to a selected class of litigants on an arbitrary or capricious basis.

"When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U. S. 56, 77 (1972).

The denial of appeal in disciplinary proceedings are not in the same class as ordinary civil or criminal litigants. Even if that were true, equal protection would still be denied, for the state gives to all Kentucky professionals, *except attorneys*, the right of at least one judicial review of disciplinary determination against them; and, the scope of the review embraces all questions of law and fact, including the substantiality of the evidence.

CONCLUSION

Thus it is clear that at both the administrative and judicial level due process was lacking and that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS L. HOGAN
JOHN TIM McCALL
3636 1st National Towers
Louisville, Kentucky 40202

*Counsel for Petitioner,
Victor W. Dungan*

APPENDIX

RENDERED: JULY 3, 1979

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

Complainant

v.

VICTOR W. DUNGAN

Respondent

OPINION

Rehearing Denied August 21, 1979

In disciplinary proceedings, the Supreme Court held that charging a fee for representing an indigent defendant, failing to return \$700 of \$1,000 given by the indigent defendant's mother, and testifying falsely at a preliminary hearing as to retention of only \$300 to pay possible fines and costs warrants disbarment.

Disbarment ordered.

Attorney and Client, Key 38

Charging a fee for representing an indigent defendant, failing to return \$700 of \$1,000 given by the indigent defendant's mother, and testifying falsely at a preliminary hearing as to retention of only \$300 to pay possible fines and costs warrants disbarment. KRS 31.250; ABA Code of Professional Responsibility, DR1-102(A)(3-6), DR2-106 (A), DR7-102(A)(5).

Leslie G. Whitmer, Director, Michael M. Hooper, Asst. Director, Kentucky Bar Association, Frankfort, for complainant.

John Tim McCall, Louisville, for respondent.

PER CURIAM.

The factual context for this disciplinary proceeding against Victor W. Dungan, a licensed attorney of the Kentucky Bar, is as follows.

On August 15, 1977, Dungan was visited in his law office by Mrs. Antonia Krueger, who informed Dungan that he had been appointed public defender for her son, Richard Krueger, who was facing two criminal charges in Bullitt County Court. Mrs. Krueger had in her possession a cashier's check in the amount of \$1,000.

According to Mrs. Krueger, Dungan took the check, keeping \$500 as an attorney's fee and the balance to defray anticipated court costs. Dungan, on the other hand, maintains that he retained \$300 for potential court costs and returned \$700 in cash (which he had on hand following a vacation) to Mrs. Krueger. In any event, Dungan deposited the check in his escrow account that day.

Dungan represented Richard Krueger at a preliminary hearing around noon the following day (August 16), during which he informed the court that Mrs. Krueger had deposited \$300 with him to cover fines and costs. County Attorney Chester Porter represented the Commonwealth. Richard was fined and his sentence suspended. At the close of the hearing Dungan moved to be removed as public defender in order to be retained as counsel. Bullitt County Judge Arson Moore denied the motion on the grounds that the case had already been disposed of. Dungan paid the fine and court costs amounting to \$159 with a check (No. 233) from his escrow account and wrote Mrs. Krueger a check (No. 234) for \$141. Dungan wrote a third check (No. 235) from the escrow account to himself for \$700, with the notation "refund of personal funds." That check, dated August 15, was not deposited until August 22.

Based on information given by Mrs. Krueger to Judge Moore and County Attorney Porter prior to the preliminary hearing, Mrs. Krueger signed a warrant (prepared by Porter) against Dungan on the afternoon of August 16 for violation of KRS 31.250, which prohibits charging a fee while representing an indigent defendant. The Bullitt

County Grand Jury, however, did not return an indictment against Dungan for the offense.

Dungan was subsequently charged by the Inquiry Tribunal on two counts of engaging in unethical and unprofessional conduct. Count I charged that Dungan had been appointed public defender for Richard Krueger, that he charged a \$500 attorney's fee, and that he failed to return \$700 of the \$1,000 given to him by Mrs. Krueger. (DR 1-102(A)(3-6); DR 2-106(A)). Count II charged that during the preliminary hearing Dungan falsely stated to the court that he had retained only \$300 from Mrs. Krueger to pay possible fines and costs (DR 7-102(A)(5)).

The trial commissioner, after a hearing, made findings of fact that Dungan did not return the \$700 and that he made a false statement to the Bullitt County Court and found Dungan guilty on both counts.

Having reviewed the record, this court is of the opinion that the findings and conclusions of the trial commissioner and the Board of Governors are supported by a preponderance of the evidence and that the unanimous recommendation of permanent disbarment should be adopted. It is significant that Dungan failed to produce a receipt from Mrs. Krueger for a cash transaction involving an amount as large as \$700. In addition, Dungan deposited Mrs. Krueger's check in his escrow account on August 15, the same date he allegedly wrote a \$700 escrow check to himself to refund the cash he had given Mrs. Krueger earlier. The latter check was not deposited until August 22, however, and Dungan's explanation that he carried it in his wallet for a week stretches credibility. And, unlike Dungan, Mrs. Krueger had no reason to fabricate her story.

The respondent, Victor M. Dungan, is disbarred from the practice of law in this Commonwealth, and ordered to pay the costs incurred in this proceeding as directed by SCR 3.450. The respondent shall comply with the provision of SCR 3.390.

All concur.

**MINUTES AND CERTIFICATION OF PROCEEDING
BY BOARD OF GOVERNORS
KENTUCKY BAR ASSOCIATION**

IN RE: VICTOR W. DUNGAN

I, B. M. Westberry, President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 15 members entitled to vote on disciplinary matters being present, and all other persons and staff absent from the room.

The record of the case was physically present.

On motion made and seconded, the report of the Trial Commissioner was received.

The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty	15
Not Guilty	0
Abstaining	0

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 15 recommending to the Supreme Court of Kentucky that the respondent, Victor W. Dungan, be permanently disbarred and required to pay the costs in this action.

Pursuant to SCR 3.370, a written decision of the Board was ordered to be filed with the Director.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 20th day of January, 1979.

(s) B. M. Westberry, President

ATTEST:

(s) Leslie G. Whitmer, Director

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - - *Complainant*

v.

VICTOR W. DUNGAN - - - - *Respondent*

TRIAL COMMISSIONER'S REPORT

Comes now the Trial Commissioner, William R. Forester, of Harlan, Kentucky, and states that he was appointed Trial Commissioner in the above captioned matter on January 30, 1978, and that a hearing was held on this matter at Louisville, Kentucky, on April 27, 1978, and that, at that hearing the following persons were present and/or represented by counsel, to-wit:

- (1) Kentucky Bar Association: Represented by
Honorable Bruce R. Hamilton
Commonwealth Attorney
La Grange, Kentucky

Honorable Michael M. Hooper
Assistant Director
Kentucky Bar Association
- (2) Respondent, Victor W. Dungan, was present in person and represented by
Honorable John Tim McCall, Counsel

**STATEMENT OF CHARGES
COUNT I**

That the Respondent, Victor W. Dungan, violated the Code of Professional Responsibility:

- (a) *Disciplinary Rule 1-102A, Sub 3*
“(3) Engage in illegal conduct, involving moral turpitude;

- “(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- “(5) Engage in conduct that is prejudicial to the administration of justice;
- “(6) Engage in any other conduct that adversely reflects on his fitness to practice law.”

(b) *2-106 (A)*

“A lawyer shall not enter into an agreement or charge, or collect an illegal or a clearly excessive fee.”

COUNT II

Count II involves disciplinary rule 7-102 (5):

“Knowingly make a false statement of law or fact.”

COUNT I

This Count charges the Respondent, Victor W. Dungan, while a member of the Public Defender System in Bullitt County, was appointed as a Public Defender to represent one Richard Krueger, in the Bullitt Quarterly Court and, while under such appointment, he obtained some \$700.00 as attorney's fee from Mrs. Antonia Krueger.

COUNT II

Count II is that the Respondent, Victor W. Dungan, falsely told the Bullitt Quarterly Court Judge, Honorable Arson Moore, that he had received \$300.00 from Mrs. Antonia Krueger to pay for a possible bond and/or fine.

STATEMENT OF DEFENSES

The Respondent's response to Count I was that he had obtained a \$1,000.00 check from Mrs. Antonia Krueger and had cashed the check for her, keeping \$300.00 for the approximate fines and court costs and returning to her the \$700.00 in cash, from his pocket.

The defense to Count II was that Respondent did not give false information to Judge Arson Moore but had, in

fact only received \$300.00 from Mrs. Antonia Krueger to pay the prospective fines and/or court costs emanating from the charges against Richard Krueger.

STATEMENT OF THE PROCEEDINGS

The proceedings are well documented in the Transcript of the proceedings, to-wit:

(1) Each party was asked if they could stipulate as to the precise nature of the charges and they were in agreement that the charges were essentially as set out in the “Statement of the Charges”, supra.

(2) The burden of proof was on the Kentucky Bar Association and, after counsel for Kentucky Bar Association and Respondent, Victor W. Dungan had made their opening statements, the Kentucky Bar Association introduced its evidence in chief. Thereafter the Respondent, through his attorney, Honorable John Tim McCall, introduced his evidence in chief, with the order of witnesses being waived so that the Respondent, Victor W. Dungan, was the last witness to testify so that his other witnesses could leave early.

The hearing took approximately eight and one-half hours.

At the conclusion, the parties were asked if they desired to make closing statements and Mr. Hamilton made a closing statement on behalf of the Kentucky Bar Association and Mr. McCall made a closing statement on behalf of the Respondent, Mr. Victor W. Dungan.

At the conclusion, each of the parties was offered an opportunity to submit any supplemental position papers prior to the rendering of a decision by the Trial Commissioner and each declined that opportunity.

Thereafter, the hearing was adjourned.

STATEMENT OF FINDINGS OF FACT

The Trial Commissioner feels that the preponderance of the evidence establishes the following facts, and he so finds:

(1) That the Respondent, Victor W. Dungan, was appointed as a Public Defender for one Richard P. Krueger on or about August 14, 1977.

(2) That on or about August 15, 1977, he was advised of his appointment under the Public Defender System. (See Bar Exhibit 6.)

(3) That on or about August 15, 1977, the Respondent, Victor W. Dungan, obtained from Mrs. Antonia Krueger a cashier's check in the amount of \$1,000.00 as attorney's fees and allowances for fines and/or court costs against the said Richard P. Krueger.

(4) That he did not return the \$700.00, the basis of his defense, to the said Antonia Krueger, but that this Cashier's Check in the amount of \$1,000.00 was deposited to the account of Mr. Victor W. Dungan on August 15, 1977, and that on or about August 22, 1977, a \$700.00 check, payable to Mr. Dungan, cleared the Louisville Trust Company bank account of Mr. Dungan, although the check had been written August 15, 1977. (See Bar Exhibits 3-B, number 4 and number 5.)

(5) The Trial Commissioner also finds that the said Victor W. Dungan falsely advised the Judge of the Bullitt Quarterly Court that he had received only \$300.00 from Mrs. Antonia Krueger, when he had, in fact, received \$1,000.00 and had paid fines and court costs of \$159.00 and paid Mrs. Antonia Krueger the sum of \$141.00, for a total of \$300.00. This left an attorney's fee of \$700.00.

Dated this 9th day of June, 1978.

(s) William R. Forester
Trial Commissioner
Kentucky Bar Association
Forester Building
Harlan, Kentucky 40831

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

Complainant

v.

VICTOR W. DUNGAN

Respondent

CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Victor W. Dungan, whose last known address is Maryville Office Building, 5019 Maryville Drive, Louisville, Kentucky, a member of said association, did engage in the following unprofessional and unethical conduct:

I

On or about August 15, 1977, Respondent was appointed by the Bullitt County Judge as a public defender to represent one Richard P. Krueger in the case of *Commonwealth v. Krueger*, Bullitt County Court, #40992B. On August 15, 1977, Krueger's mother, Antonia Krueger, whose last known address is 721 E. 155th Street, Cleveland, Ohio, came to Respondent's office after being informed that Respondent was appointed to represent her son. Mrs. Krueger endorsed a \$1,000 cashier's check and gave same to Respondent who was claiming a \$500 attorney fee and the remainder to be applied to a possible fine and court costs. At the conclusion of the said criminal proceedings on August 16, 1977, Respondent paid by check from his escrow account court costs and fine totalling \$159 and a refund to Mrs. Krueger of \$141. Respondent also issued to himself a check for \$700 and failed to refund any part of said \$700 to Mrs. Krueger.

II

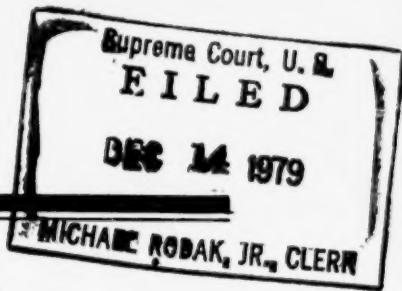
Within the same facts and circumstances of Count I above, and during the hearing of *Commonwealth v. Krueger*, Respondent falsely told the court that he had received \$300 from Mrs. Krueger to pay for a possible bond and/or a fine. At the end of the said hearing Respondent moved the court to be relieved of his appointment as public defender and proceed as private counsel.

WHEREFORE, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RAP 3.380.

Kentucky Bar Association
By: (s) Herbert D. Sledd
Member
Inquiry Tribunal

ATTEST:

(s) Leslie G. Whitmer, Director
Kentucky Bar Association



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-806

VICTOR W. DUNGAN Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION..... Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER

Director-Counsel
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601
COUNSEL FOR RESPONDENT

December 12, 1979

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IN THE**SUPREME COURT OF THE UNITED STATES****OCTOBER TERM, 1979****NO. 79-806****VICTOR W. DUNGAN** Petitioner**VERSUS****KENTUCKY BAR ASSOCIATION.....** Respondent**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY****BRIEF FOR RESPONDENT IN OPPOSITION****OPINION BELOW**

The opinion of the Supreme Court of Kentucky (Petition, Appendix 17-19) is reported at 586 S.W. 2d 15.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association, a unified bar association, and the Supreme Court of Kentucky were conducted in such a way as to deny petitioner procedural due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.
2. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

Rules of Supreme Court of Kentucky (SCR, formerly RAP) Concerning Procedures in Disciplinary Cases

SCR 3.130 ABA Code of Professional Responsibility Recognized as Authority

The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

(Before January 1, 1978 Amendment)

SCR 3.330 Order of Proceedings and Burden of Proof

The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial

Committee, the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings, the burden shall rest upon the applicant. Before submission, the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee, there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

(Before January 1, 1978 Amendment)

SCR 3.360 Trial commissioner to file report with board

When a disciplinary proceeding has been finally submitted, the trial commissioner shall promptly file with the board within thirty (30) days after the transcript of evidence is filed by the reporter with the director the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

- (a) the charges made against and the defense offered by the respondent;
- (b) the proceedings had;
- (c) the facts which the commissioner deems proven by substantial evidence.

The trial commissioner's report shall constitute a part of the record in the case. The report shall be advisory. Within forty (40) days after the filing of the report

with the director, each party shall file a brief simultaneously with the director and no reply briefs shall be permitted.

(Amended eff. 1-1-78)

SCR 3.370 Board's Action on Trial Committee's Report

Upon receipt of the report of the Trial Committee, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified and the Chief Justice shall appoint a member to consider and act on the case.

The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in the proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The President shall sign and file with the Director an order setting forth the Board's action, and the Director shall mail copies of such order together with a copy of the Trial Committee's report to the parties or their counsel and to each member of

the Tribunal. If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of, the proceedings shall be filed with the Clerk. Any recommendation to the Court that disciplinary action be taken shall be advisory.

(Before January 1, 1978 Amendment)

SCR 3.370 Board's action on trial commissioner's report and procedure in the court

(1) Upon receipt of the report of the trial commissioner, the board shall promptly consider and act upon the entire record. Only the president, the president-elect, the vice president and the fourteen duly elected members of the board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the board under this rule, or has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) The board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the board shall then decide by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or 3/4 of the members of the board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the

board's minutes, together with a decision of the board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this rule. The president shall sign and file with the director an order setting forth the action and decision of the board, and the director shall mail copies of such order and decision together with a copy of the trial commissioner's report, to the parties or their counsel and to each member of the tribunal.

(4) The board will, in its decision, state wherein it differs with the findings of fact of the trial commissioner, and will state the discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to and in the conduct of the proceedings, shall be filed with the clerk by the director.

(6) The respondent may file a notice for the court to review the board's decision within thirty (30) days after the board's decision is filed with the clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The director may file a brief within thirty (30) days thereafter in support of the board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the clerk, conditioned that if the principal in the bond be disciplined by the court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response *in forma pauperis*, no bond shall be required.

(7) The court may within forty (40) days of the filing of the board's decision notify both the director and respondent that it will review the board's decision. If the court so acts, the director and respondent may

each file briefs within forty (40) days with no right to file reply briefs unless by order of the court whereupon the case shall stand submitted. Thereafter, the court shall enter such orders or opinion as it deems appropriate on the entire record.

(8) If the respondent does not file a notice of review or the court does not notify the parties of its review under paragraph (7) of this rule, the court shall enter an order adopting the decision of the board relating to all matters.

(9) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (7) of this rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

(Amended eff. 1-1-78)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

. . . Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

**Kentucky Constitution, Section 116
(Enacted 1974, effective January 1, 1976):**

. . . The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

KENTUCKY REVISED STATUTES

KRS 21A.150 Powers of Kentucky Bar Association in

disciplinary proceedings

As deemed necessary in the exercise of its power to discipline attorneys, as granted by section 116 of the Constitution, the Supreme Court may authorize the Kentucky Bar Association to conduct hearings, administer necessary oaths, take testimony under oath, compel the attendance of witnesses, and compel the production of records and other evidence.

(Effective June 19, 1976)

KRS 21A.160 Organization and control of state Bar vested in Supreme Court

The Supreme Court has power to provide for the organization, government and membership of the state Bar of Kentucky and to adopt rules and regulations to govern conduct and activity of the state Bar and its members.

(Effective June 19, 1976)

COUNTERSTATEMENT OF THE CASE

On October 7, 1977, one Antonia Krueger of Cleveland, Ohio, filed a notarized complaint in the Office of the Director of the Kentucky Bar Association (respondent herein) raising substantial allegations that Victor W. Dungan (petitioner herein) had engaged in unethical and unprofessional conduct. Petitioner was sent a copy of the complaint and filed a response thereto on October 25, 1977, all pursuant to the rules of the Supreme Court of Kentucky. The response raised no federal or state constitutional issues nor mentioned any objection to the burden of proof standard imposed by the rules of the state supreme court.

On December 16, 1977, the Inquiry Tribunal (hereinafter called "Tribunal") filed a charge consisting of 2 counts alleging that petitioner had engaged in unethical

and unprofessional conduct by converting the funds of his client to his own use and making a misrepresentation to the Bullitt County Court during the course of representing his client. Petitioner filed an answer to the charge on January 6, 1978, and the Tribunal determined that it raised issues of fact. On February 20, 1978, the Chief Justice of the Supreme Court of Kentucky, by court rule, designated and commissioned a trial commissioner to try the issues in the disciplinary proceeding and a trial hearing was held on April 27, 1978. The trial commissioner filed his report on June 12, 1978, with the Board of Governors, Kentucky Bar Association (hereinafter called "Board") finding respondent guilty as charged. Pursuant to the provisions of SCR 3.370, respondent filed its brief on July 19, 1978 with the Board and petitioner filed his brief on July 21, 1978. At no time during the trial hearing nor in briefs before the Board nor in the answer to the charge did petitioner raise any federal or state constitutional issues nor mention any objection to the burden of proof standard imposed by the rules of the state supreme court.

On January 20, 1979, the Board, by a vote of 15-0, found petitioner guilty as charged and unanimously recommended to the Supreme Court of Kentucky that petitioner be disbarred from the practice of law in the Commonwealth of Kentucky. The very detailed opinion and recommendation of the Board was filed with the Supreme Court of Kentucky on February 27, 1979. On March 29, 1979, petitioner filed a notice for review and supporting brief pursuant to SCR 3.370(6). Respondent filed its Response to Notice for Review on April 18, 1979. The Supreme Court of Kentucky rendered its Per Curiam Opinion of disbarment on July 3, 1979. Petitioner filed a Petition for Rehearing on July 23, 1979 and respondent filed a response thereto on July 24, 1979. The petition was denied and the state supreme court's mandate was issued

on August 21, 1979 and was stayed by that court for 90 days on August 23, 1979, to permit the filing of his Petition with this Court. At no time in briefs or petitions before the state supreme court did petitioner raise any federal or state constitutional issues nor object in any way to the burden of proof standard imposed by the rules of the Supreme Court of Kentucky.

REASONS FOR DENYING THE WRIT

The respondent, Kentucky Bar Association, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Kentucky's opinion in this case.

The issues raised by the petitioner concern novel constitutional arguments that stretch the imagination and he argues inapplicable case law for those arguments.

ARGUMENT

The issues raised by the petitioner for the first time in his Petition for a Writ of Certiorari before this Court concerns the constitutionality of the procedures utilized by the Supreme Court of Kentucky in disciplining its officers.

Each issues raised by petitioner will be answered briefly after a short consideration of the general issues in the case even though no argument on which the Petition is based was raised in the state supreme court proceeding.

I

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION

During the course of the disciplinary proceeding before the respondent and the Supreme Court of Kentucky never once did respondent raise a federal or state

constitutional issue in any response to the initial complaint (Brief in Opposition, Appendix I), answer (Brief in Opposition, Appendix II), briefs, arguments before the Trial Commissioner (Petition, Appendix, pages 21-24), petitions, arguments before the Board (Brief in Opposition, Appendix III), or arguments before the Supreme Court of Kentucky (Petition, Appendix, pages 17-19). Counsel for respondent has carefully reviewed all transcripts, pleadings, briefs and petitions filed in the state court and has failed to find any mention of "due process", a "higher standard of proof", or "denial of equal protection". The appendices to the Petition and the Brief in Opposition reflect the arguments made in the case which related specifically to a conflict in testimony before the Trial Commissioner. Neither the Trial Commissioner, the Board or the state supreme Court had any difficulty in resolving the apparent conflicts against petitioner.

Petitioner was given every opportunity before the state court to raise federal constitutional issues but he failed to do so. The petition for Writ of Certiorari must be denied on this basis.

"It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question has been properly raised in the state court proceeding."³⁶

"For purposes of certiorari under subsection (3), the validity of such a treaty or statute must have been 'drawn in question' or a federal title, right, privilege or immunity must have been specially set up or claimed.' These phrases, 'drawn in question' and 'specially set up or claimed', are substantially identical in nature, both of them referring to the raising of a substantial federal question in the correct manner."

Stern & Gressman, *Supreme Court Practice*, 5th edition (1978) at page 208.

It is interesting to note footnote 36 shown above stating:

"The admonition bears repeating 'that if you are about to commence litigation (in a state court) in which there may be involved, then or ultimately, a question arising under the Constitution or laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late . . . unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all.' Wiener, *Wanna Make a Federal Case Out of It?* 48 A.B. A.J. 59, 60, 62 (1962)."

Even though petitioner's petition for writ of certiorari must be denied on the foregoing argument, respondent will answer the constitutional question raised in the petition.

II

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND...

The constitutional issues raised by petitioner in his Petition for a Writ of Certiorari are whether or not the disciplinary proceedings by the Kentucky Bar Association and the Supreme Court were conducted in such a way as to deny him rights of procedural due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution. The Court in its per curiam opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Supreme Court of Kentucky

and Kentucky case law, the findings of the trial commissioner and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved and confirmed the Trial Commissioner's and Board's advisory findings. (Appendix to Petition pp 18-19). The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The state court has clearly stated this position in *Kentucky Bar Association v. Stivers*, Ky., 475 S.W. 2d 900, cert. denied, 406 U.S. 968 (1972), stating, in part:

"The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken; the role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our rules for this type of proceeding."

"But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted, but cannot be convicted."

"In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the court did exercise its own judgment by the fact that it exercised its own judgment in specifically reviewing the testimony and stated what it felt were the significant facts in the case. (Petition, Appendix, page 19).

The conclusion of the Court to disbar petitioner was based on a series of Kentucky cases where lawyers have been disbarred for converting funds of a client to their own use. *In re Waxman*, Ky., 160 S.W.2d 587 (1942); *Kentucky Bar Association v. Grogan*, Ky., 554 S.W. 2d 81 (1977); *Kentucky Bar Association v. Friedlander*, Ky., 554 S.W. 2d 454 (1976); *Kentucky Bar Association v. Tucker*, Ky., 535 S.W. 2d 97 (1975); *Kentucky Bar Association v. Collis*, Ky., 535 S.W. 2d 97 (1975); American Bar Association Code of Professional Responsibility, DR 1-102(A)(3-6) and DR 2-106(A).

Likewise, the Court found petitioner had violated the ABA Code of Professional Responsibility DR 7-102(A)(5) in making a misrepresentation to the Bullitt County Court. (Petition, Appendix, p. 19).

Its factual findings are based on the entire record and it stated the provisions of the Code of Professional Responsibility adopted by it which were violated. (Appendix to Petition, p. 19; SCR 3.130). The court did not need to elaborate further in its concise and clear opinion. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this Court to grant a Petition for Writ of Certiorari, and yet a close examination of

the issues involved and a careful reading of the opinion rendered by the Supreme Court of Kentucky clearly reveals that the results reached in this case by the Supreme Court of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Supreme Court of Kentucky and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Supreme Court of Kentucky and the sound standards of conduct applied to those facts by the court.

III

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 9 of his petition that *In re Ruffalo*, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association*, Ohio, 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary pro-

cedures on a procedural due process argument.

Indeed, the United States Court of Appeals for the Sixth Circuit reviewed the precise issues petitioner raises under Rule 3 of the Supreme Court of Kentucky (formerly Court of Appeals of Kentucky) and rejected due process arguments stating:

(3, 4) There are, as appellants assert, some unusual features in the Kentucky procedure. The State Bar Board of Governors' review of a complaint (Step 2) is entirely *in camera* excluding the respondents who had been complained against. And the recommendations of the Trial Committee (Step 1) and those of the Board of Governors (Step 2) are entirely advisory. Kentucky's highest court has interpreted its rule as reserving to itself final decision as to both guilt and penalty after its review of the record made before the Trial Committee and the recommendations of the Trial Committee and the Board of Governors. *Kentucky State Bar Association v. Stivers*, 475 S.W. 2d 900 (Ky. Ct. App. 1972). Part 3 of the Rules of the Kentucky Court of Appeals provides a full hearing on written charges, with rights of confrontation and counsel before the Trial Committee. There is no allegation that those rights were not made available to appellants. The Court of Appeals decisions were based upon the full written record made before the Trial Committee and after full hearing before the Court of Appeals itself. The panel of this court which decided the *Taylor* case was, we feel, eminently correct in rejecting federal due process attacks upon K.R.S. § 30.170 (1975) and Part 3 of the Rules of the Kentucky Court of Appeals. *Getty v. Reed*, 547 F. 2d 771, CA 6 (1977).

It is significant to note Chief Justice Warren E.

Burger's comments on nationwide disciplinary efforts:

"It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the states. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks by Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young University, Provo, Utah, September 5, 1975.

Petitioner readily admits he had a full due process hearing before a trial commissioner who was designated and commissioned by the Chief Justice of the Supreme Court of Kentucky to try the issues in the proceeding. (KRS 21A.150)

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Supreme Court of Kentucky, it is necessary to start at the beginning of the disciplinary process which is an original action in the state supreme court. In petitioner's case, a complaint was filed and investigated. Matters of severe unprofessional conduct were disclosed. Notice was given of the complaint and a timely response was filed. The Inquiry Tribunal, appointed by the Chief Justice of the Supreme Court of Kentucky, reviewed the complaint and response and determined that probable cause existed to conclude

that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charge and a copy of the charge and filed a timely answer thereto. A full due process hearing was held in a "de nova" climate with the opportunity for an oral argument. (SCR 3.330). The advisory trial commissioner's report, the charge, the answer, and transcript of proceedings before the trial commissioner with briefs by the parties were reviewed by the Board of Governors without the presence of counsel on either side.

The Board of Governors had three alternatives; dismiss the charge, issue a private reprimand, or recommend public discipline to the Supreme Court of Kentucky. If the first two alternatives had been exercised, the case would have terminated without any detriment to the petitioner and the Board's sole function as a "screening device" would have been utilized under the rules in effect on the date the charge was filed. (SCR 3.370 before 1/1/78 amendment). The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Supreme Court of Kentucky discipline in the form of disbarment. At that point a possible point of detriment to petitioner, the court's rules provide for a review by the Court. Petitioner at that point, again, had an opportunity to file a response and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Supreme Court of Kentucky was rendered, petitioner exercised his right to file a petition for rehearing. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions after absolute notice of the allegations being made.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Supreme Court of Kentucky.

The disciplinary proceedings of the Supreme Court of Kentucky are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 5th Edition (1978), page 932.

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device." A charge can be dismissed by the Board, however, no public discipline can be ordered so there is *no final action taken* by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the entire record including all evidence produced at the due process hearing. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 21A.160) and the inherent power of the Supreme Court of Kentucky (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary

file before the Board and has the opportunity to respond to the Board's decision and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the Trial Commissioner, Board and the court in this area.

Had the "Board" step of the proceeding been eliminated, the case would have gone to the Supreme Court of Kentucky for determination of factual matters and the degree of discipline to be ordered. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The tests of *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963); *Southern Railway Co. v. Virginia*, 290 U.S. 190 (1933); *Londoner v. Denver*, 210 U.S. 373, 386; *Morgan v. United States*, 298 U.S. 468, 481 (1936), are sustained by Kentucky disciplinary rules. Petitioner had notice in fact, answered as fully as he could before the Inquiry Tribunal, the trial commissioner and the court before final discipline was ordered. He was also heard before the court on a petition for rehearing.

Petitioner makes the novel argument that under the Supreme Court of Kentucky's disciplinary proceedings he was denied equal protection and due process because he was denied the right of appeal since every other litigant in Kentucky is permitted an appeal as a matter of right. All attorneys in Kentucky are officers of the Court. All attorneys are subject to the same disciplinary rules stated in Rule 3 of the Supreme Court of Kentucky. In no other profession than the legal profession are the members of the profession officers of a branch of state government. The Supreme Court of Kentucky is the licensing agent for Kentucky attorneys and maintains sole jurisdiction over a law license. Disciplinary proceedings are original actions in the state supreme court although, consistent with due

process, a three tried system (the Tribunal, a trial commissioner and the Board of Governors) has been established by the Court to produce a record on which it can base its review. In addition, petitioner had a right to petition for a rehearing which he exercised. Consistent with the rules of the Court, petitioner sought and obtained a review of his case by the Supreme Court after the opportunity in a notice and supporting brief to re-argue the facts of his case. In ordinary civil and criminal cases, Kentucky law provides for at least one appeal from an adverse decision in a lower court. In attorney discipline proceedings which are original actions, the Supreme Court of Kentucky, like the United States Supreme Court, has established proceedings under their inherent authority to police the legal profession in the public interest. Kentucky's proceedings gave petitioner every possible forum to present his defenses which were insufficient to vindicate him from a disbarment status.

IV

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the majority of the Justices of the Supreme Court of Kentucky is based soundly on facts in the record of pleadings, briefs and evidence before it. The Trial Commissioner and the Board of Governors, supported by the court, considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A review of the opinion and recommendation of the Board of Governors (Brief in Opposition, Appendix III) will display the intense consideration and analysis of the facts given by the Board. A fair

reading of the entire record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts and its grave effect on the image of the bench and bar.

Petitioner contends that the standard of proof on respondent should be "beyond a reasonable doubt", a criminal standard, rather than by "substantial evidence". RAP 3.330, in effect on the day the charge was filed against petitioner stated, in part: ". . . the burden of proof shall rest on the association in disciplinary proceedings and the facts must be proven by a preponderance of evidence." The Supreme Court of Kentucky applied this standard. (Petition, Appendix, page 19).

In Kentucky, as a matter of sound state law, attorney disciplinary proceedings are civil in nature. Commonwealth ex rel. *Buckingham v. Ward*, Ky., 267 KY. 677 (1937). This Court has never reversed a state court disciplinary hearing because it was a civil proceeding. The "proven by a preponderance of evidence" standard is absolutely consistent with the civil nature of Kentucky's proceedings. The Supreme Court of Kentucky has clearly stated its concern to give a member of the bar every reasonable doubt. Petitioner's argument is really moot in Kentucky since the Supreme Court of Kentucky has held that it is probably each justice applies the "beyond a reasonable doubt test" anyway. *Kentucky Bar Association v. Franklin*, Ky., 534 S.W. 2d 459 at 463 (1976). It is interesting to note that all three review bodies (the Trial Commissioner, the Board and the Court) agree without a single dissent that petitioner is guilty as charged by the Inquiry Tribunal.

This Court has made clear the strong state interest of state courts in disciplining its members in the case of *Gold-*

farb v. Virginia State Bar, et al., 95 S. Ct. 2004 (1975) at p. 2016 when it stated:

"We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L.Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida*, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L.Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand*, 401 U.S. 154, 157, 91 S. Ct. 720, 723, 27 L.Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on factual issues before this Court. If the Supreme Court of Kentucky gave little significance to the petitioner's evidence, it was due to the lack of credibility of evidence and not due to an oversight on the part of the court. Here again, petitioner

has urged as a reason for granting Certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601
Counsel for Respondent

APPENDIX

APPENDIX I

KENTUCKY BAR ASSOCIATION Plaintiff

vs. **ANSWER TO COMPLAINT
OF ANTONIA KRUEGER**

VICTOR W. DUNGAN Defendant

* * * * *

Comes Victor W. Dungan, the accused therein and states as follows:

1. That I am innocent of any and all wrongdoing in this case.
2. That I believe that such charges are politically inspired by certain officials in the Bullitt County Courthouse.
3. That such charges have been tried both in the press and before the courts of Bullitt County with the Bullitt County Grand Jury voting 11-1 to dismiss the charges.
4. That the time of filing such charges with the Kentucky Bar Association was the following day after the said grand jury dismissal.
5. I believe that they are filed with the intention of preventing the accused from having time to campaign for the office of District Judge of Bullitt County against Fred Friske the partner of the County Attorney.
6. That during the tenure of this month's grand jury the Circuit Clerk to whom the jury must report daily and from whom they must receive their pay, had displayed on her counter the campaign items of my opponent, Fred Friske, for the jurors to pick up and copies of such materials are included herein which were taken from her office.

7. That I request that these charges be dismissed at once or in the event it is necessary to hold a hearing, that such hearing be held after November 20, 1977, in order to not interfere with my election campaign.

8. Enclosed are some of the news articles which have appeared and tend to show that the County officials are using the Frankfort office of the Attorney General for my persecution.

Further affiant sayeth naught.

/s/ Victor W. Dungan

Subscribed and sworn to before me by Victor W. Dungan this the 19th day of October, 1977.

My commission expires August 31, 1980.

/s/ Charlene Danks, Notary Public

Enclosures:

1. Announcement of Candidacy
2. Porter's attack on Residence thru Attorney General's Office
 - (a) Louisville Times Article
 - (b) Bullitt Courier Article
3. Arrested
 - (a) Louisville Times Article
 - (b) Pioneer News Article
4. Grand Jury Dismisses 11-1
 - (a) Louisville Times Article
 - (b) Pioneer News Article
5. Copies of Friske materials given out by Circuit Ct. Clerk when jury was selected
6. Affidavit of Charlene Tewell Danks
(Enclosures omitted from Appendix)

APPENDIX II

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION . COMPLAINANT

VS. RESPONSE TO CHARGE

VICTOR W. DUNGAN RESPONDENT

Comes Victor W. Dungan, in person and by counsel, and states as follows in response to the charge made herein:

I

That the Respondent denies that he did anything unethical, unprofessional, dishonest, or illegal, or anything calculated to bring the bench and bar of Kentucky into disrepute.

II

That he cashed the said \$1,000 check for Mrs. Krueger, giving her \$700 in cash to accommodate her since she could not get the check cashed at the local banks. (She was from Cleveland, Ohio and the check was also from another state, Georgia.) He then placed the \$300 in escrow to cover the fine and/or bond for the convenience of Mrs. Krueger and her son. Thus, Respondent charged Mrs. Krueger no fee for representing her son and the unused portion of the \$300 was returned to her at the completion of the hearing.

4-A

III

That the transcript of evidence recorded in the rather lengthy preliminary hearing of *Commonwealth v. Dungan* #40897B conducted on/or about September 16, 1977 showed the testimony of Mrs. Krueger to be contradicted by not only that of this attorney, Vic Dungan, his secretary, Mrs. Charlene Danks, two bank officials and Sheriff George Rummage, but also by that of her own so-called witness, Mrs. Rosilyn Niemann who testified that she could have been out of the room when the \$700 was given to Mrs. Krueger because she left when Dungan was on the phone. (Transcript of Evidence pp. 91, 92, 99)

IV

That there seems to have been evidence of collusion between the County Attorney J. Chester Porter and Mrs. Krueger in that she stated that she had \$2,000 when she asked for a free attorney and that during the hearing for her son that she was in Mr. Porter's office filing a complaint against Vic Dungan since she already knew the outcome of her son's trial. (Transcript of *Com. vs. Krueger* #40992B pp. 62, 63, 64, will bear out the fact that Mr. Dungan couldn't locate her to testify on behalf of her son.)

V

That all the evidence was heard against Vic Dungan by the October 1977 session of the Bullitt Grand Jury on a special day set aside for the benefit of the Attorney General's Office to present all of the evidence to indict Dungan, but the Grand Jury dismissed the case as lacking sufficient evidence for an indictment.

5-A

VI

That Dungan's well publicized arrest occurred during his heated campaign for District Judge of Bullitt County against Fred Friske, the law partner of J. Chester Porter.

VII

That Mr. Dungan enjoys such an excellent reputation in the community that he was only narrowly defeated (approx. 1800-2100) in said race for District Judge in the aftermath of the adverse publicity of being arrested.

WHEREFORE, Respondent demands that the charge be dismissed.

Respectfully submitted,

/s/ Victor W. Dungan
Respondent-Attorney

I hereby certify that a copy of the within was mailed to Mr. Leslie G. Whitmer, Director, Ky. Bar Association, Frankfort, Ky. 40601, this 5th day of January, 1978.

/s/ Victor W. Dungan

APPENDIX III

IN SUPREME COURT

FILE NO. _____

KENTUCKY BAR ASSOCIATION COMPLAINANT

OPINION AND RECOMMENDATION

V. OF

BOARD OF GOVERNORS OF

KENTUCKY BAR ASSOCIATION

VICTOR W. DUNGAN **RESPONDENT**

In this disciplinary proceeding the Respondent, Victor W. Dungan, is charged by Complainant with two Counts of unprofessional conduct calculated to bring the Bench and Bar into disrepute. Each of these Counts arises from the same series of transactions during which it is alleged that Dungan, while participating as a Public Defender in Bullitt County, Kentucky, solicited and/or accepted and retained a fee for his services in representing an indigent criminal defendant for whom Dungan had been appointed counsel, and that Dungan thereafter falsely misrepresented to the Bullitt County Court those circumstances regarding his receipt and retention of such a fee. This matter comes before the Board by way of Transcript of the evidentiary Hearing conducted before the duly-appointed Trial Commissioner on April 27, 1978, as well as certain volumes of the proceedings which took place in the Bullitt County Court and relating to the subject transactions, and all Exhibits filed as a part of any of those Transcripts.

On or about August 6, 1977, one Richard Krueger was

charged in Bullitt County with the offense of theft by unlawful taking of property exceeding in value the sum of \$100.00, as well as another related misdemeanor. Krueger's mother, Antonia Krueger, having been notified of her son's arrest and detention in Bullitt County, traveled from her home in Cleveland, Ohio, to Shepherdsville, Kentucky for the purpose of assisting Richard in defending against the charges made against him. Prior to arriving in Kentucky, Mrs. Krueger had obtained from a friend a cash loan in the sum of \$1,000 and had likewise obtained a cashier's check made payable to Mrs. Krueger, and in the sum of \$1,000.00, from a relative of a friend who accompanied her on the trip to Kentucky.

Mrs. Krueger and her companion arrived in Shepherdsville in the early morning of August 15, 1977, and subsequently visited with Richard at the Bullitt County Jail where he was being confined. In talking with a Pre-Trial Release Officer about Richard's case, Mrs. Krueger learned that Victor Dungan had been appointed by the Bullitt County Court to represent Richard. Accordingly, Mrs. Krueger, Mrs. Niemann, and Mrs. Niemann's infant daughter visited Respondent's office near midday on August 15th for the purpose of consulting with him about young Krueger's difficulties. Although Respondent's appointment by the Bullitt County Court as counsel for Richard Krueger had been made before Mrs. Krueger's arrival at his office, Respondent apparently was unaware of that appointment prior to being advised of that fact by Mrs. Krueger. It is, however, uncontroverted that, at some point during Respondent's initial conversation with Antonia Krueger, he became aware of and acknowledged his appointment as a participant in the Public Defender program in his County. During the course of Respondent's interview with Mrs. Krueger, Respondent inquired as to

whether the lady had any funds, and she responded by telling Respondent about the \$1,000.00 cashier's check and exhibiting same to him. She did not disclose to him the fact that she likewise had in her possession all, or nearly all, of the \$1,000.00 cash advancement made to her before leaving Cleveland. Respondent says that he then expressed to Mrs. Krueger his concern over her son's utilization of the Public Defender program when it appeared that she could afford to employ counsel for the boy. According to both Mrs. Krueger and Mrs. Niemann, the latter likewise being present in Respondent's office during much, but not all, of that period of time within which Respondent and Mrs. Krueger conversed, the Respondent then proceeded to advise them that very little was expected of attorneys who represented criminal Defendants pursuant to appointment by the Court, but that he would agree to represent Richard Krueger by way of regular employment upon payment of a fee of \$500.00, and that he should likewise retain an additional \$500.00 for the purpose of paying the fines and Court costs which might be assessed against young Krueger. Mrs. Krueger agreed to such an arrangement and handed to Respondent the \$1,000.00 cashier's check, whereupon Respondent telephoned his Bank to inquire about the necessity of Mrs. Krueger's endorsement and/or personal appearance at the Bank in order that this check might be negotiated. Thereafter, Mrs. Krueger endorsed the check and left it with Respondent, and departed Respondent's office with the general understanding that there would be further communications between them prior to any Hearing which might transpire in the Bullitt County Court with regard to Richard's cases. On that same date, August 15th, Respondent went to the branch of the Louisville Trust Company at which he regularly did business and deposited

the \$1,000.00 cashier's check into his escrow account at that Bank.

After leaving Respondent's office, Mrs. Krueger visited with her son at the Bullitt County Jail and then called Respondent again at about 4:30 that afternoon, during which conversation Respondent suggested that the boy might have to stay in jail until September 12. Mrs. Krueger then became suspicious of Respondent's efforts on her son's behalf and began to question in her own mind the advisability of having handed over to Respondent the \$1,000.00 cashier's check. It was not, however, until the following morning, August 16th, that she conveyed to Bullitt County Judge Arson Moore, and, ultimately, to Bullitt County Attorney J. Chester Porter, information regarding her conference with Respondent. Both Mrs. Krueger and Mrs. Niemann were then asked to sign affidavits describing the events of the previous day, and were told to remain in the office of the County Attorney inasmuch as it had been agreed that the Bullitt County Court would conduct a preliminary Hearing with regard to the Richard Krueger cases in the early afternoon of August 16th. At that preliminary Hearing, both the Court and the County Attorney inquired from Respondent as to his previous transactions with Mrs. Krueger, obviously in an effort to discern whether Respondent agreed with that set of facts which had previously been communicated to them by Mrs. Krueger. During the course of the informal communications among the Court and counsel, those communications having been transcribed as a part of that Court's proceedings, Respondent acknowledged his representation of Richard Krueger as a Public Defender, and further represented to the Court that Antonia Krueger had deposited with him the sum of \$300.00 which might be utilized toward the payment of fines and/or Court costs in

those cases. He did not explain to the Court those additional circumstances which he contends existed at that time, particularly that Mrs. Krueger had in her possession a sizeable sum of money as the result of his "cashing" her check.

The preliminary hearing in Krueger's case resulted in an agreement among counsel to the effect that the felony charge against Richard Krueger would be reduced to a misdemeanor, that Krueger would plead guilty to both misdemeanor charges thus pending against him, that he would pay fines and Court costs totaling \$159.00 and receive a suspended jail sentence, whereupon he would be immediately free to leave Bullitt County. At this point in the proceedings, Respondent asked to be permitted to withdraw as appointed counsel for Richard Krueger, his apparent reason for such request being that he might then retain the balance of the money given him by Mrs. Krueger, after the payment of fines and Court costs, as a fee and thus relieve the Public Defender program from having to pay for his services therein. That Motion was denied by the Court, and Respondent indicated that he would return the excess funds to Mrs. Krueger.

Shortly after the conclusion of the preliminary hearing, Mrs. Krueger and Mrs. Niemann, having by this time gone to the Bullitt County Courthouse, met Respondent there and, during some conversation which took place on the Courthouse grounds and outside the building proper, Respondent delivered to Mrs. Krueger a check drawn on his Escrow Account in the sum of \$141.00 without indicating precisely what that sum represented, and told Mrs. Krueger that her son was now free to leave. When this conversation ended, Mrs. Krueger indicated her desire to walk back through the Courthouse, and Respondent suggested to her that she could not enter the

building through a back door and that she should take another route to her car in preparing to leave with her son for Cleveland.

Sometime during the afternoon of August 16, 1977, and based upon the affidavits theretofore made by Mrs. Krueger and Mrs. Niemann, a criminal Warrant was issued for the arrest of Respondent, such criminal process charging him with a violation of KRS 31.250 with regard to his alleged collection of a fee while representing an indigent Defendant, Respondent was thereafter arraigned in the Bullitt County Court on that charge and a preliminary hearing was conducted which resulted in the charge against the Respondent being held to the Bullitt County Grand Jury, which did not return an indictment against Respondent, thus bringing to conclusion the criminal charge made against him.

Dungan's defense to the charges of unprofessional conduct brought against him herein consisted of a materially-different version of the initial transaction which took place between Mrs. Krueger and himself. He testified that, when Mrs. Krueger came to his office, she made some complaint about needing funds and having been unable to cash the certified check which she had in her possession, whereupon he offered to cash that check from his personal funds, retaining \$300.00 to be applied toward fines and costs assessed against her son, and giving to her the balance of \$700.00 in currency from his wallet. Respondent explains that he had returned from a brief vacation a day or two prior to August 15th, and that he had taken with him upon that trip substantial amounts of cash which left him with the large sums in his wallet when Mrs. Krueger arrived at his office. Respondent offered in his defense the testimony of a friend with whom he had traveled while on vacation, that testimony being to the

effect that Respondent paid cash for most of the accommodations and services which he required during that trip, but that testimony shed no light upon the initial sums possessed by Respondent when the vacation commenced, the total amount spent during the vacation, nor what was left in Dungan's possession when the vacation ended. It is noteworthy that Respondent produced no evidence, by way of either testimony or documents, which would indicate that, prior to undertaking his vacation trip, he obtained any significant sums of cash for use on the trip. Respondent further admits that, despite the rather unusual nature of the transaction with Mrs. Krueger which he describes, he did not document that transaction by means of receipt or other writing by either Mrs. Krueger or himself.

Respondent's version of this incident goes further to state that he did proceed to deposit the cashier's check on the afternoon of August 15th and that, on that same date, he tore one page of checks (consisting of three checks) from his Escrow Account checkbook, leaving blank two of these checks and making the third one payable to himself in the sum of \$700.00 by way of reimbursement of the money which he says he gave Mrs. Krueger. According to Respondent, he then put the August 15th escrow account check in his wallet, and admittedly did not deposit it until August 22nd, and that he used the other two checks on August 16th, one for the purpose of paying to the Bullitt County Court the \$159.00 in Court costs and fines which Richard Krueger owed, and the other check representing the \$141.00 refund to Mrs. Krueger which has been mentioned previously. He states further that he originally felt that he would need to checks to pay Court costs and fines to the Bullitt County Court, because there were two charges pending against Richard Krueger; he does not

explain why he might have felt that both of those charges would be disposed of at the County Court level, inasmuch as there was no discussion regarding disposition of the charges made against Richard Krueger until the time of the preliminary hearing on August 16th. The foregoing elaborate explanation of the use of the escrow checks is made necessary, from Respondent's viewpoint, because of the introduction into the Record of certain documents evidencing his financial transactions in connection herewith. A photocopy of the bank ledger sheet pertaining to Respondent's escrow account indicates the deposit of \$1,000.00 on August 15th, and further shows a check for \$700.00 drawn on that account having been charged against the account on August 22, 1977. The photocopy of the check stubs of those three checks in question indicates that Checks No. 233 and 234, those being the checks made payable to the Bullitt County Court and to Antonia Krueger, were dated August 16, 1977, while Check No. 235, that being the check by which Dungan says he reimbursed himself for the personal funds given to Mrs. Krueger, was dated August 15th. In other words, if the Respondent did what he testified to, then he not only used the checks out of numeral sequence, but he filled in the stub for Check No. 235 on August 15th while leaving blank stub Nos. 233 and 234 immediately above. Respondent offers no particular reason for not having deposited the check made payable to himself in the sum of \$700.00 for a week after it was allegedly written, insisting that he merely carried that check in his wallet for several days, and even subsequent to having been charged with the criminal offense detailed hereinabove.

Respondent's defense to the fact that both Mrs. Krueger and Mrs. Niemann testified to the identical transaction between Krueger and Respondent in his office is

simply that, while Mrs. Krueger is mistaken or not telling the truth, Mrs. Niemann could not know about the refund made to Mrs. Krueger because she was not in Respondent's private office, but was seated with her daughter in the waiting room, at the time that this refund was made. Respondent's secretary at the time of the transaction in question likewise testified in Respondent's behalf, and her testimony was rather curiously supportive of Respondent's position in that she testified that, as she returned to the office (apparently from lunch), Mrs. Krueger and Mrs. Niemann were with respondent in his private office, and that the door thereto was open so that she could overhear their conversation. She recalled some conversation about the Cashier's Check, and about the \$300.00 which was to be retained by Respondent for the payment of fines and costs, and she further recalls a conversation between Dungan and Mrs. Krueger (and while Mrs. Niemann was in the waiting room) during which money was being counted out by Dungan. The secretary further testified walking by the door and observing some currency which was stacked on Dungan's desk, although she did not actually see any money being given to or accepted by Mrs. Krueger. Interestingly enough, the secretary, who apparently kept Respondent's books and reconciled his checkbooks for him, testified that while he had been on vacation, he paid all of his expenses by check, but that he had taken enough cash with him to cover any expenses for which he might be unable to write a check. The secretary's recollection of these events is, at best, questionable, because she testified that Dungan, after having been apprised of the criminal charge made against him, sat down and discussed with her in detail the events which had supposedly transpired while Mrs. Krueger and Mrs. Niemann were in his office, and the suggestion is

quite strong that, in so doing, Dungan himself "refreshed" his employee's recollection about these circumstances.

Respondent further suggests that he is the victim of some sort of political conspiracy in connection with this transaction in that he was, in August of 1977, involved as a candidate for the office of Bullitt District Court Judge, and his opponent at that time was a law partner of the Bullitt County Attorney. There is nothing in this Record, however, which would justify the conclusion that Respondent's political leanings, or his involvement in this judicial race, had any bearing upon the introduction through Mrs. Krueger and Mrs. Niemann of the testimony upon which Respondent's guilt, if any, is to be based.

The applicable sections of the Code of Professional Responsibility which Respondent is alleged to have violated are these:

- A) DR 1-102 (a) A lawyer shall not:
 - (3) Engage in illegal conduct involving moral turpitude.
 - (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
 - (5) Engage in conduct that is prejudicial to the administration of justice.
 - (6) Engage in other conduct that adversely reflects on his fitness to practice law.
- B) DR 2-106-(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.
- C) DR 7-102 (A) In his representation of a client, a lawyer shall not.

(5) Knowingly make a false statement of law or fact.

If Respondent is guilty of obtaining from Mrs. Krueger any fee at all with respect to his prospective representation of her son, then he has violated the Code provisions enumerated A) and B) above. If he did receive such a fee, then he further misrepresented to the Bullitt County Court the nature of his transactions with Mrs. Krueger, and thus ran afoul of those Code provisions enumerated A) and C) above.

Respondent suggests in his Brief, that, inasmuch as the Bullitt County Grand Jury which considered the criminal charges brought against him failed to return an indictment, the decision of that body, based upon whatever evidence was heard by it, should be either dispositive of this disciplinary proceeding or should influence the outcome thereof. However, the distinction between the two separate types of proceedings, and the lack of relationship between them, has been firmly established in this Commonwealth.

In Re Vincent v. Ky., 282 SW (2d) 335 (1955)

Further, Respondent contends that the case against him consists of nothing more than the testimony of one (or two) other persons who have sworn to facts materially different from those to which he has testified, and that he is entitled to be given the benefit of any doubt which may exist; and if some doubt about these charges existed among the Board members, then we might well feel constrained to accept and put into practice that proposition. However, each member of the Board participating herein has concluded, after careful consideration of this Record, that the charges of unethical and unprofessional conduct on the part of Respondent have been convincingly established. The Trial Commissioner who heard this case was persuaded, and so

are we, that Respondent accepted the \$1,000.00 cashier's check from Mrs. Krueger without making any refund of cash to her; and that he intended to retain a portion of those funds as a fee, knowing full well that he could not properly do so. Thus, there follows the inescapable conclusion that respondent intentionally misrepresented to the Court which appointed him his retention of these funds, and then attempted to justify his collection of a fee, *ex post facto*, by seeking to void his appointment as counsel pursuant to the Public Defender program. We are likewise of the unanimous opinion that the nature of the misconduct proven with respect to Respondent is such that his membership in the Kentucky Bar Association should be terminated.

Kentucky Bar Association v. Grogan, 554 SW (2d) 81 (1977)

In accordance with all of the foregoing, the Board of Governors of the Kentucky Bar Association finds Respondent guilty of unprofessional and unethical conduct calculated to bring the Bench and Bar into disrepute and recommends that he be disbarred from the further practice of law within this Commonwealth, and ordered to pay the costs of these proceedings.

This Opinion and Recommendation shall constitute the Findings, Conclusions and Order required of the Board by SCR 3.370.

This 22nd day of February 1979.

BOARD OF GOVERNORS
KENTUCKY BAR
ASSOCIATION
/s/ By B. M. Westberry
President

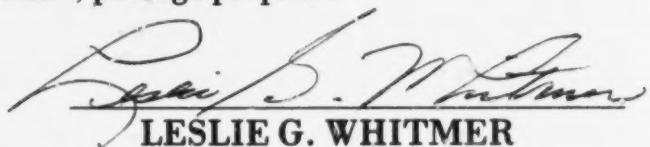
ATTEST:

/s/ LESLIE G. WHITMER — DIRECTOR,
KENTUCKY BAR ASSOCIATION

FEB. 22, 1979

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for the Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of December, 1979, I served on the Honorable John T. McCall, 200 Interchange Building, 835 West Jefferson Street, Louisville, Kentucky 40202 and Thomas L. Hogan, First National Tower, Louisville, Kentucky 40202, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.



LESLIE G. WHITMER